

# Mining Reclamation Newsletter



## ISSUE 2

*News Briefs*

*March 2003*

*Select title for complete article.*

### 1. [Purpose of Newsletter](#)

The Nonmetallic Mining Reclamation Program has developed a newsletter to broadly share information between regulators, mine operators, and the public. This newsletter can be used to raise and resolve general issues, broadcast announcements, provide reclamation advice, in addition to many other possibilities. Another function of the newsletter is to address the on-going need to keep everyone posted on upcoming fee and reporting deadlines, training opportunities, conferences, as well as Nonmetallic Mining Advisory Committee meetings.

The Mining Reclamation Newsletter will be published next month followed by quarterly publication.

### 2. [Public notice and opportunity for hearing for existing mines under NR 135 Background](#)

Recently, through outreach, meetings, conversation and correspondence with NR 135 regulatory authorities (RAs) and nonmetallic mine operators, the Department has been made aware that public notice and hearing opportunity provisions for existing mines are not always well-understood. The Department has tried in its outreach and communications to clarify this issue, so all affected and interested parties understand the requirements and procedures. This article is part of the effort.

### 3. [Topsoil Part 1: Overview of topsoil requirements and relationship to reclamation plan](#)

The Department has received many questions relating to topsoil recently. They include the advisability of placing prescriptive standards in an ordinance and the appropriate replacement depth of topsoil. Wisconsin law 295.12 (3), Stats., mandates statewide reclamation standards to achieve a post-mining land use. The purpose of the reclamation

plan is to achieve acceptable final site reclamation to a desired land use in compliance with the uniform reclamation standards.

In response to s. 295.12 (3), Stats., the Department, with the advice of an external Technical Advisory Committee, wrote NR 135, Wis. Adm. Code. This rule included topsoil management requirements (NR 135.09) which provide that topsoil and topsoil substitute material be managed (removed, obtained, stored) and redistributed following an approved reclamation plan written to achieve a desired post-mining land use. This is clearly not a "one size fits all" approach. Each site needs to be considered in the context of the post-mining land use and other local factors. In keeping with the intent of the statutes and the code, it is best to look to solutions that are outcome based (performance standards) rather than those based on a prescriptive approach.

#### **4. A form for the registration of nonmetallic mineral deposits is now available**

A form that may be used by landowners who wish to register land containing a marketable nonmetallic mineral deposit is now available on the nonmetallic mining Web site. The registration form and instructions are provided for your convenience: <http://www.dnr.state.wi.us/org/aw/wm/publications/index.htm> (under "Mining" and "Forms").

#### **5. Registration of nonmetallic mineral deposits workgroup**

At the conclusion of a discussion at the February 19, 2003 Nonmetallic Mining Advisory Committee meeting a motion was made indicating the need for "*...the DNR [to] form a workgroup to look for opportunities to create stronger links between all the parties, programs and existing databases that deal with the location of deposits, land use planning and Comprehensive Growth*".

#### **6. "Head's-up"**

- Department share of 2003 annual fees collected from unreclaimed acreage is due to the DNR on March 31, 2003.
- Regulatory authority's annual report to the Department is due by May 31, remember that an electronic submittal form is available.
- Program review audits to begin this spring/summer.

#### **7. Suggestion Box**

We need your help and involvement in order to improve the DNR's outreach capabilities. Please send us any ideas, questions, announcements, topics, or comments. In addition, we encourage you to submit ideas for a **Newsletter Name**. The next, newly named newsletter should be published in about a month. Responses can be emailed to Tom Portle (email: [Thomas.Portle@dnr.state.wi.us](mailto:Thomas.Portle@dnr.state.wi.us))

## **Purpose of Newsletter:** by Tom Portle

The Wisconsin Department of Natural Resources strives to provide technical support and facilitate communication in order to enhance nonmetallic mine reclamation throughout the state. One approach to this is to publish an electronic newsletter. This was decided to be the most cost-effective approach given that access is available to more users who are becoming increasingly more comfortable with this format.

During our August 1, 2002 Nonmetallic Mining Advisory Committee (NMAC) meeting the Department was advised to increase and enhance outreach. Members of the NMAC and the public (operators, regulatory authority staff, and consultants) who participated in the meeting requested that the Department provide a variety of outreach products. It was felt that a newsletter and other outreach efforts are especially important during early program implementation. As reclamation plans are submitted for review and approval there will be many specific issues or questions that will require resolutions or answers. This newsletter will be used to share this information.

Beyond this, we continue to receive indications that a number of county and municipal staff lack a clear and detailed understanding of the reclamation program. This may be partially due to the time elapsed since that training (fall of 2000) and the fact that many staff now involved did not have the opportunity to attend the initial training in fall of 2000. To address these needs, it is our hope that the newsletter can act both as a vehicle to connect regulatory staff with information sources they need, and to broadly share information on program implementation issues. For example, if there are code interpretations that are arrived at these can be made widely available. In doing so, there are potential benefits to be gained through improved efficiency and consistency - time, energy, research and problem solving efforts would not have to be repeated.

Another function of the newsletter is to address the on-going need to keep everyone posted regarding upcoming deadlines, training opportunities, conferences, NMAC meetings and so forth.

In publishing this newsletter, the intent is to NOT make a permanent commitment regarding publication frequency. Instead, it will be published monthly for the first 2 or 3 months and then reduced to an as needed basis, but not less than quarterly.

**Public notice and opportunity for hearing for existing mines:** by Dan Graff, WDNR  
Nonmetallic Mining Program Attorney

Recently, through outreach, meetings, conversation and correspondence with NR 135 regulatory authorities (RAs) and nonmetallic mine operators, the Department has been made aware that public notice and hearing opportunity provisions for existing mines are not always well-understood. The Department has tried in its outreach and communications to clarify this issue, so all affected and interested parties understand the requirements and procedures. This article is part of the effort.

**I. Notice Required for “New Mines”**

Recognize that operators of “new mines”, sites where operators applied for reclamation permits after August 1, 2001, are required under s. NR 135.18(2)(b)3., Wis. Adm. Code to submit a reclamation plan with their application before a reclamation permit can be issued. For new mines, RAs are required under s. NR 135.20(1), Wis. Adm. Code to provide notice when such applications are received, and par. (b) requires the notice shall describe the opportunity for hearing “pursuant to this section”. Under s. NR 135.20(2), Wis. Adm. Code, there are two possibilities for hearing.

Section NR 135.20(2)(a), Wis. Adm. Code provides that if there is a zoning-related hearing on the mining site, the RA is required at it to provide an opportunity for testimony on reclamation-related matters. This is not discretionary. Therefore a notice of the reclamation permit application must include the chance to present reclamation-related testimony at the zoning-related hearing.

If there is no zoning-related hearing, however, s. NR 135.20(2)(b)1., Wis. Adm. Code provides for an opportunity for public informational hearing if requested by persons who live, own property or have their principal place of business within 300 feet of the property containing the mine. Such persons must request an informational hearing within 30 days of the actual date of public notice. Testimony at such hearing is limited to reclamation and intended to assure that RAs have all relevant information in order to make an appropriate decision on the proposed reclamation plan in issuing a permit. In such cases, the hearing can be held only if requested by the specified persons. The notice should make it clear that the hearing can only be held if properly requested, and an RA cannot, on its own, schedule a reclamation-related informational hearing absent a zoning-related hearing that would depend on authority outside NR 135.

**II. No Notice for Issuance of “Automatic Permits” to Existing Mines**

When NR 135 was being drafted, the idea of an “automatic permit” was adopted. This was agreed to so that existing mines could continue to lawfully operate after the permit requirement in s. NR 135.16, Wis. Adm. Code came into effect on September 1, 2001. Under s. NR 135.18(1), Wis. Adm. Code, fairly simple requirements were established for mine operators to apply to the applicable regulatory authority for

automatic permits. RAs that received permit applications that met these requirements were required under s. NR 135.21(1)(a), Wis. Adm. Code to issue such mines “automatic” reclamation permits within 30 days, in order to meet the September 1, 2001 permit requirement.

Under such tight timelines, the code was intentionally drafted without the need for notice and opportunity for hearing. This was important for issuance of automatic permits under s. NR 135.20(4)(a), Wis. Adm. Code, because no hearing was required initially. Once a follow-up plan is submitted, however, notice may be required as discussed below.

### **III. Notice and Hearing for Follow-Up Plan Submittals by Existing Mines**

An important requirement for existing mine reclamation permits, in s. NR 135.21(1)(a)1., Wis. Adm. Code, was for the mine operator, at a later date to be established by the RA, to submit a reclamation plan meeting the requirements of s. NR 135.19, Wis. Adm. Code to carry out the reclamation standards in subch. II of ch. NR 135. The possibility of public notice and an opportunity for informational hearing for existing mines issued “automatic permits” is tied to submittal of this reclamation plan.

#### **A. No Notice for Previously-Approved Plans Meeting NR 135 Requirements**

For mines that submit previously approved plans that meet the reclamation standards of NR 135, s. NR 135.20(4)(b), Wis. Adm. Code provides that no notice or opportunity for informational hearing is required. Such previously approved plans must meet the conditions of s. NR 135.21(1)(d), Wis. Adm. Code, namely that they are approved by a county or municipality and satisfy NR 135. The logic is, such approved plans already meet NR 135 requirements, and a regulatory decision had been made, so it was decided further public participation wasn’t needed. Sites for which no notice is ever required under s. NR 135.20(4)(b) are probably relatively rare. They may occur in populous, highly-regulated areas such as southeastern Wisconsin through zoning approvals, or in places like Marathon County that operated nonmetallic mining reclamation permit programs before enactment of NR 135.

#### **B. Notice and Opportunity for Hearing on New Reclamation Plans**

When an existing mine with an automatic permit submits a new reclamation plan, under s. NR 135.20(4)(c), Wis. Adm. Code, the public notice and opportunity for an informational hearing is required. **This may not have been clearly understood, but the code requires RAs to provide notice when automatically permitted mines submit new reclamation plans.** The Department interprets “new” to mean not yet submitted to a regulatory or zoning authority for review.

The notice needs to follow the requirements of s. NR 135.20(1), Wis. Adm. Code. It must include a class 2 notice in the regulatory authority’s official newspaper, as well as copies provided to the bodies and persons listed in s. NR 135.20(1)(c), Wis. Adm. Code,

which include owners of land within 300 feet of the boundary of parcels of land containing the nonmetallic mine. The copies must be “forwarded”, which does not mean personal service or registered or certified mail. This requirement can usually be satisfied by personal delivery, ordinary mail or equivalent means.

The hearing procedures are set out in s. NR 135.20(2)(b), Wis. Adm. Code. An informational hearing may only be requested within 30 days of the notice above by persons residing, owning property or whose principal place of business is within 300 feet of the boundary of parcels of land containing the mine. Only where such request is made can an informational hearing be scheduled, no sooner than 30 days nor later than 60 days after an appropriate request is made. An RA may **not** hold a hearing at its discretion, or if requested by persons, no matter how many, who don’t live, own property or work within 300 feet of the mine property [absent a zoning-related hearing which is extremely unlikely for any existing mine]. The procedures and subject matter of the informational hearing, if held, are specified under secs. NR 135.20(2)(b)1. and 2., Wis. Adm. Code. These specify that the hearing is informational only, and held to explain the proposed mine reclamation and receive comments from affected persons on the its nature, feasibility and effects. Testimony at such a hearing, if held, is limited to reclamation.

### **C. Previously-Submitted Plans Needing Supplementation to Satisfy NR 135**

Finally, the code recognizes that in some cases previously approved reclamation plans will be submitted that partially but not completely meet the requirements of NR 135. In s. NR 135.21(1)(e), Wis. Adm. Code, the RA is given authority to request supplemental information needed to satisfy the reclamation requirements of NR 135. In such cases, the RA shall determine, based on the nature and extent of the supplemental material, whether or not to provide notice and opportunity for public hearing using the procedures discussed above for new mines. A Regulatory Authority given a lengthy supplemental submittal with many important aspects of reclamation specified for the first time [such as post-mining land use, type of revegetation and final contours] could reasonably decide to provide notice and opportunity for public hearing. An RA given only minor supplemental information, such as a specific seed mix or details of certain limited sloping measures, could reasonably decide to forego such notice. RAs should consult with their legal counsel to decide what defensible decisions may be made regarding notice under the provisions of s. NR 135.21(1)(e), Wis. Adm. Code.

## **IV. Questions and Issues**

Below are a few questions and issues that have come up during recent Department outreach with RA's and mine operators. For follow-up, or additional questions or issues, please contact the DNR mining subteam staff for your region – they can be found through the following link: <http://www.dnr.state.wi.us/org/aw/wm/mining/nonmetallic/staff.htm>.

**1. Can an RA on its own schedule a hearing for a mine reclamation plan?**

No [absent a zoning-related hearing that would need to include an opportunity to present reclamation-related matters, unlikely for existing mines]. The notice is required as discussed in part III. B. above. An informational hearing on an existing mine's reclamation plan can be scheduled only if requested by persons living, owning property or with a principal place of business within 300 feet of the mine property boundary. Note that this hearing may be requested only within 30 days of notice, and must be held no sooner than 30 and no later than 60 days after appropriately requested. See s. NR 135.20(1)(b)1, Wis. Adm. Code for details of these requirements.

**2. Can an RA ask existing mine operators issued automatic permits whether they wish to have informational hearings on their plans?**

No. A hearing can be held only where notice is required and if requested within 30 days by appropriate persons, as discussed above.

**3. Can an informational hearing for nonmetallic mining reclamation take testimony on matters of public concern such as blasting, traffic, or general concerns about mine siting?**

No. Section NR 135.20(2)(b)2., Wis. Adm. Code provides that subject matter and testimony at an informational hearing is limited to reclamation of the nonmetallic mining site. RA staff conducting such hearings should make it clear that the hearings cannot cover non-reclamation matters that may be of public concern, such as traffic, blasting, hours of operation or the question of whether to use the land for mining. These are outside of the scope of NR 135 and any hearing held pursuant to it. If addressed, they must be covered by other local regulatory programs [where they exist] such as zoning, police power or control of nuisances. You may have to be persistent, but the public should understand the NR 135 informational hearing is limited to reclamation-related matters that will be considered by the RA in the plan approval process.

**4. Can an RA hold one hearing covering several plans submitted by different mines?**

Maybe. There is no prohibition to this in the code, so long as its schedules are followed. These require public notice no later than 30 days after receipt of each complete new reclamation plan. Furthermore, the hearing must be held between 30 and 60 days after an appropriate request. If such scheduling requirements can be honored, the RA may decide to hold one hearing covering multiple plans. It would have to weigh, however, the risk of confusion of issues for different, perhaps distant mines and potentially quite different reclamation plans.

**5. Has the DNR developed a model for public notice under s. NR 135.20(1)?**

No, because different counties and municipalities are likely to have their own unique standards, procedures and requirements for such notices arising from their own specific nonmetallic mining reclamation ordinances and other legal requirements. RAs are advised to consult with their legal counsel for advice on what jurisdiction-specific legal requirements apply to this notice.

However, a notice of receipt of a new reclamation plan from a mine issued an “automatic” permit should, in addition to basic information on the mine operator, location and date of plan submittal, address the following to meet the requirements of s. NR. 135.20, Wis. Adm. Code:

- Be published within 30 days after receipt of a complete application.
- Describe the mining [including a brief but reasonably specific location].
- Describe the reclamation proposed in the submitted plan [again, this can be brief].
- Be a class 2 notice pursuant to s. 985.07(2), Stats. in the official newspaper of the county or municipality.
- Tell the location[s] where the public may review the submitted plans, permit application and any other supporting materials.
- Explain the opportunity for requesting a public informational hearing, including the requirement that it must be requested within 30 days of the notice by a person living, owning property or with a principal place of business within 300 feet of the boundary of the property containing the mine.
- Explain that the hearing is informational and for the purpose of explaining and receiving comment on the nature, feasibility and effect of proposed reclamation and shall be limited to matters relating to reclamation [and may not cover operational, siting-related or other issues].
- If any exist, explain any other procedures from the RA’s ordinances that will be used for the informational hearing.



## **Topsoil Part I: Overview of Topsoil Requirements and Relationship to Reclamation Plan:** by Tom Portle

The Department has received many questions relating to topsoil recently. They include the advisability of placing prescriptive standards in an ordinance and the appropriate replacement depth of topsoil. Wisconsin laws 295.12 (3), Stats., mandates statewide reclamation standards to achieve a post-mining land use. The purpose of the reclamation plan is to achieve acceptable final site reclamation to a desired land use in compliance with the uniform reclamation standards.

In response to s. 295.12 (3), Stats., the Department, with the advice of an external Technical Advisory Committee, wrote NR 135, Wis. Adm. Code. This rule included topsoil management requirements (NR 135.09) which provide that topsoil and topsoil substitute material be managed (removed, obtained, stored) and redistributed following an approved reclamation plan written to achieve a desired post-mining land use. This is clearly not a "one size fits all" approach. Each site needs to be considered in the context of the post-mining land use and other local factors. In keeping with the intent of the statutes and the code, it is best to look to solutions that are outcome based (performance standards) rather than those based on a prescriptive approach.

### **Soil depth and volume to be given in reclamation plan**

As is the case for most aspects of reclamation, the post-mining land use is the key factor driving the details of a reclamation plan. The land use and the needs of the plants seeded or installed to support that land use will dictate the depth of soil replacement and the volume of soil required. That is why the proper place to address the issues of topsoil depth and/or quality is in the reclamation plan and is why there is no prescriptive standard given in NR 135.09. Instead, this determination is made on a case-by-case basis considering a number of factors. Thus, such decisions must come out of the process or reclamation plan development, proposal, review and approval (or conditional approval) ultimately leading to the issuance of a reclamation permit.

In some cases, especially for unreclaimed acres associated with existing mines, (those that were in operation prior to August 1, 2001) it is necessary to employ substitute topsoil. (See the definition of substitute soil as defined in NR 135.03 (24)). When possible, in situ materials other than topsoil (such as overburden) may be used, amended or supplemented. Also, there are occasions when substitute topsoil material may be imported to replace or augment the existing soil material.

Regardless of the proposed post-mining land use, if there is a lack of sufficient topsoil of adequate quality, it is necessary to include information on substitute topsoil in the proposed reclamation plan. The best solution may be gained through the process of proposal and review of the reclamation plan. Among the attributes **of the substitute**

**topsoil**<sup>1</sup> proposed by the applicant are depth, texture, organic matter content, moisture holding capacity and nutrient analysis. Some, or all of this information may be necessary to determine if the proposed substitute topsoil material is indeed adequate to support the plant species proposed by the applicant.

For example, a deep-rooted species might be proposed because of its value as food for wildlife and ability to prevent erosion. But if the total depth of the substitute soil is insufficient to meet the needs of the proposed vegetation, then some dialogue with the applicant (possibly including the use of test plots - see below) is necessary in order to reach agreement.

### **Consider Opportunities to Augment or Improve Substitute Topsoil**

It may be advisable to check with local municipalities (compost, yard waste, etc.) or local producers (manure or any other safe and acceptable organic material) when seeking substitute topsoil material. Such materials may be employed either as part of a substitute soil, or as an amendment to the stored and redistributed topsoil provided their quality and safety is assured.

This topic will be elaborated on in an upcoming issue of the Reclamation Newsletter.

### **Test Plots**

If questions remain about what is adequate in terms of topsoil, or substitute topsoil depth or quality, there are some additional steps that may be taken. Perhaps the applicant could show another local site that has been successfully reclaimed using a similar approach as a model, or provide relevant literature supporting the topsoil depth/quality proposal. If this is not available, or if questions remain, test plots may be used on-site. In some cases the installation and monitoring of test plots may be an approval condition. This can be a great way for both the regulatory authority and the applicant to demonstrate that the revegetation success standards given in the reclamation plan will be achieved. After all, anything that can be done to hasten the success of reclamation will result in the prompt release of the operator's financial assurance.

In any case, test plots are best installed and observed during the course of the project to demonstrate the viability of the soil management portion of the reclamation plan - that it will support the vegetation as proposed.

In summary, topsoil depth and quality is dependent on many variables including the proposed post-mining land use, the specific needs of vegetation proposed in the revegetation plan, existing soils on site and the availability of substitute topsoil. As always, coordination between the site operator and the RA is of utmost importance.

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<sup>1</sup> "...provide adequate stability, and meet any other attributes necessary to meet (vegetative) success standards in the reclamation plan, [note: this language is from the definition of "topsoil substitute material" in NR 135.03 (24)].